

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BERNADETTE LISA FOGELL)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 01-611-SLR
)	
PATRICK RYAN, Warden, JANE)	
BRADY, Attorney General,)	
CORRECTIONAL MEDICAL SERVICES,)	
GAIL HAYES, DR. CECIL GORDON,)	
and ST. FRANCIS HOSPITAL,)	
)	
Defendants.)	

Bernadette Lisa Fogell, Dover, Delaware. Plaintiff, pro se.

Ophelia M. Waters, Esquire, Deputy Attorney General, Wilmington, Delaware. Counsel for Defendants Jane Brady and Patrick Ryan.

Kevin J. Connors, Esquire of Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware. Counsel for Defendants Correctional Medical Services and Dr. Cecil Gordon.

Dennis D. Ferri, Esquire and Eileen K. Andersen, Esquire of Morris, James, Hitchens & Williams, LLP, Wilmington, Delaware. Counsel for Defendant St. Francis Hospital.

MEMORANDUM OPINION

Dated: July 30, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On August 22, 2001, plaintiff filed a claim against Patrick Ryan ("Ryan"), Warden at Delores J. Baylor Women's Correctional Institute ("BWCI"), Jane Brady ("Brady"), Delaware State Attorney General, Correctional Medical Services ("CMS"), Gail Hayes ("Hayes"),¹ Dr. Cecil Gordon ("Gordon"), and St. Francis Hospital. (D.I. 2) Plaintiff alleges civil rights violations under 42 U.S.C. § 1983 in that medical neglect violated her Eighth Amendment right to be free from cruel and unusual punishment. The court has jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331.

Four motions are currently pending before this court. Plaintiff has filed a motion for appointment of counsel. (D.I. 45) Plaintiff sent a letter, dated December 31, 2002, stating she had been released from prison three months prior and had been seeking counsel, without success, continuously since her release. (Id. at 1) One lawyer reviewed plaintiff's records, but declined to represent her because of inconsistencies in the record. (Id.) In her letter, plaintiff states she was very confused by the scheduling order issued by this court on August 27, 2002 because she did not understand the legal terminology in the order. (D.I.

¹ Service on defendant Hayes was never effectuated. The return of service form, dated October 10, 2002, stated Hayes was no longer employed with CMS, therefore, the U.S. Marshal was unable to locate Hayes. (D.I. 43)

45 at 1) Plaintiff's motion requests an extension from the court to continue to seek counsel,² help finding representation, as well as an explanation of the scheduling order and what she needs to do to continue to pursue her claim. (Id. at 2) This court has been unable to find representation for plaintiff.

Three motions for summary judgment pursuant to Federal Rule of Civil Procedure 56(b) are currently pending before this court. Defendants Ryan and Brady filed a joint motion, defendants CMS and Gordon also filed a joint motion, and defendant St. Francis Hospital filed a separate motion for summary judgment. (D.I. 47, 50, 51) For the following reasons, defendants Brady, Ryan and St. Francis Hospital's motions for summary judgment are granted and defendants CMS and Gordon's motion for summary judgment is denied.

II. BACKGROUND

Plaintiff entered BWCI on December 13, 2000. (D.I. 2 at 5) At the time plaintiff entered BWCI she was approximately eight weeks pregnant. (Id.) Plaintiff states that while incarcerated she filed numerous requests for medical attention because she was experiencing severe pain and cramping, as well as notable discharge. (Id.) She was seen four times, but had only one

² Plaintiff's motion for extension of time to respond to the three outstanding motions for summary judgment was granted. (D.I. 57) A new deadline for plaintiff to respond was set for June 16, 2003. (Id.) To date, she has not responded.

examination. (Id.) Plaintiff states she never received an internal exam,³ ultrasound or fetal monitor. (Id. at 6) Plaintiff's medical records from prison contradict plaintiff's assertion that she did not have an ultrasound. Her records contain a Roentgen Report stating a pelvic sonogram was conducted on December 27, 2000. (D.I. 37 at 19) The report concluded plaintiff's fetus was approximately ten weeks and had normal fetal heart beat and motion. (Id.) Plaintiff was told her cramping, pain and discharge were normal activity, likely due to pressure from the fetus on plaintiff's bladder.⁴ (D.I. 2 at 6) Plaintiff continued to experience significant discharge, substantial enough that she wore feminine pads continuously during her last month of pregnancy.⁵ (Id.) Plaintiff states she filed "countless medical slips in a repeated attempt to at least address this issue." (Id.)

On March 19, 2001, at 11:00 p.m., plaintiff's water broke. (Id.) Other inmates changed plaintiff's clothes, helped her lay

³ Plaintiff's medical records from BWCi show plaintiff had a pap smear on January 5, 2001. (D.I. 37 at 26) The lab concluded the specimen was "within normal limits." (Id.) A screening test for fetal OSB, Down Syndrome and Trisomy 18 was conducted on February 6, 2001. (Id. at 33) The result of the test was negative. (Id.)

⁴ Plaintiff does not specify who told her that her symptoms were normal.

⁵ Plaintiff gave birth on March 20, 2001, making gestation twenty-two weeks. (D.I. 41 at 12)

down, and called for help. (Id.) Twenty minutes later, plaintiff was taken to the BWCI medical ward by Hayes and one other nurse. (Id.) Plaintiff claims Hayes belittled her and said that plaintiff's water did not break, she had just urinated in her clothes. (Id. at 6-7) Forty minutes later, a fetal monitor was attached to monitor the fetus's heart rate.⁶ (Id. at 7) According to plaintiff the heart rate dropped from 160 beats per minute to fifty five to sixty beats per minute during contractions. (Id.) The nurses told plaintiff a doctor had been notified, but no doctor was present. (Id.) Plaintiff was unhooked from the monitor and moved to a back room where, according to her, the conditions were "beyond appalling." (Id.) Plaintiff states she was "locked down without any sheets, blanket or pillow and a trash can with old, discarded food and garbage inside it and on the floor." (Id.) Plaintiff claims she was in the back room for eight and a half hours, but was observed by a nurse only once. (Id.)

At 9:00 a.m., plaintiff was transferred to St. Francis Hospital. (Id.) The staff at St. Francis paged Dr. Gordon, the CMS doctor, but he did not arrive at the hospital until 4:30 p.m. (Id. at 8) According to plaintiff, the St. Francis staff told her she would need to be transferred to Christiana Hospital so

⁶ Plaintiff claims it took forty minutes to attach the monitor because the nurses were "fumbling with the fetal monitor and its instructions." (D.I. 2 at 7)

her delivery could be delayed to increase fetus viability. (Id.) When Gordon arrived at the hospital he induced labor, then left plaintiff's room. (Id.) Gordon returned at 11:20 p.m. to deliver plaintiff's baby. (Id.) At birth, the baby weighed five hundred grams. (D.I. 41 at 15) Plaintiff's discharge summary from St. Francis Hospital states plaintiff had a "spontaneous vaginal delivery, secondary to rupture of membranes at twenty-two weeks." (D.I. 52 at 34) Subsequent to the birth of the baby, plaintiff was diagnosed with chorioamnionitis. (Id.)

During delivery the umbilical cord became separated from the placenta. (D.I. 2 at 8) As a result, Gordon manually removed the placenta in fragments from plaintiff's uterus. (D.I. 52 at 16) Plaintiff's baby was given to plaintiff to hold until the baby was pronounced dead at 3:10 a.m. on March 21, 2001. (D.I. 2 at 8; D.I. 52 at 34)

Gordon did not see plaintiff again until 11:30 a.m. on March 21, 2001. (D.I. 2 at 8) At 1:30 p.m. staff at St. Francis Hospital removed plaintiff's epidural. (Id.) At 2:00 p.m. plaintiff was transferred back to BWCI. (Id. at 9) Plaintiff was placed in the same back room of the medical ward where she had been kept after her water broke. (Id.) Plaintiff had a temperature of one hundred degrees, but was returned to her usual pod the next day. (Id.)

On March 23, 2001, plaintiff was taken back to the medical

ward because her fever remained and she was experiencing pain and uncontrollable shaking. (Id.) Gordon examined plaintiff, and told her she was physically fine and her symptoms were attributable to her emotional pain from losing her baby. (Id.) Gordon told plaintiff to continue taking Tylenol to reduce her fever. (Id.)

Plaintiff returned to the medical ward that evening at 6:30 p.m. for her scheduled dose of Tylenol. (Id.) Plaintiff was barely able to walk and had a 103.8 degree fever. (Id.) Gordon was paged, but did not respond. (Id.) A CMS nurse contacted another doctor who ordered plaintiff to be transferred back to St. Francis Hospital immediately. (Id. at 9-10) When plaintiff arrived at St. Francis Hospital, an ultrasound was performed. Plaintiff was diagnosed with retained placenta and postpartum endometritis. (D.I. 52 at 32) Surgery was performed by Dr. Richard Leader, during which "a moderate to large amount of residual placental fragments" were removed. (Id.) Plaintiff claims the doctors at St. Francis informed her that because of internal damage she would never be able to carry a baby to full term again. (D.I. 2 at 10) Plaintiff remained in St. Francis Hospital for four days.

When plaintiff returned to BWCI, she was again placed in the same back room of the medical ward for twenty-four hours of medical observation. (Id.) Plaintiff claims she only saw CMS

staff when they delivered her meals. (Id.)

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be

sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. Standard for Eighth Amendment Claim for Failure to Provide Adequate Medical Care

To state a violation of the Eighth Amendment right to adequate medical care, plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976); accord White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990). Plaintiff must demonstrate that: (1) she had a serious medical need; and (2) defendant was aware of this need and was deliberately indifferent to it. See West v. Keve, 571 F.2d 158, 161 (3d Cir. 1978); see also Boring v. Kozakiewicz, 833 F.2d 468, 473 (3d Cir. 1987). Either actual intent or recklessness will afford an adequate basis to show deliberate indifference. See Estelle, 429 U.S. at 105.

The seriousness of a medical need may be demonstrated by

showing that the need is "'one that has been diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention.'" Monmouth County Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). Moreover, "where denial or delay causes an inmate to suffer a life-long handicap or permanent loss, the medical need is considered serious." Id.

As to the second requirement, an official's denial of an inmate's reasonable requests for medical treatment constitutes deliberate indifference if such denial subjects the inmate to undue suffering or a threat of tangible residual injury. Id. at 346. Deliberate indifference may also be present if necessary medical treatment is delayed for non-medical reasons, or if an official bars access to a physician capable of evaluating a prisoner's need for medical treatment. Id. at 347. However, an official's conduct does not constitute deliberate indifference unless it is accompanied by the requisite mental state. Specifically, "the official [must] know . . . of and disregard . . . an excessive risk to inmate health and safety; the official must be both aware of facts from which the inference can be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). While a plaintiff must allege that the official was

subjectively aware of the requisite risk, he may demonstrate that the official had knowledge of the risk through circumstantial evidence and "a fact finder may conclude that a[n] . . . official knew of a substantial risk from the very fact that the risk was obvious." Id. at 842.

The law is clear that mere medical malpractice is insufficient to present a constitutional violation. See Estelle, 429 U.S. at 106; Durmer v. O'Carroll, 991 F.2d 64, 67 (3d Cir. 1993). Prison authorities are given extensive liberty in the treatment of prisoners. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979); see also White, 897 F.2d at 110 ("[C]ertainly no claim is stated when a *doctor* disagrees with the professional judgment of another doctor. There may, for example, be several acceptable ways to treat an illness."). The proper forum for a medical malpractice claim is in state court under the applicable tort law. See Estelle, 429 U.S. at 107.

B. Motion for Summary Judgment by Defendants Brady and Ryan

Defendants Brady and Ryan filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b). (D.I. 47) Defendants' brief in support of their motion argues plaintiff has failed to show a causal connection between defendants Brady and Ryan and plaintiff's medical treatment, and

in the alternative, that plaintiff's treatment was not a violation of the Eighth Amendment.

First, defendants argue plaintiff fails to state a claim under 42 U.S.C. § 1983. (Id. at 5) Defendants' brief interprets plaintiff's claim to name Brady and Ryan in their official and supervisory capacities because they are state defendants. (Id. at 3) Defendants argue plaintiff has failed to state a § 1983 claim because she has failed to show that defendants played affirmative roles in depriving plaintiff of her rights. Colburn v. Upper Darby Township, 946 F.2d 1017, 1023 (3d Cir. 1991). Defendants argue "[n]o where [sic] in her complaint does [plaintiff] mention that either the State Attorney General or the Warden had knowledge of, acquiesced in, or were even remotely responsible for her medical treatment." (D.I. 47 at 5)

Plaintiff failed to show in her complaint that defendants knew of, or acquiesced to, plaintiff's medical treatment. Plaintiff has also failed to respond to defendants' motion for summary judgment, consequently, no additional evidence has been introduced into the record showing defendants played an affirmative role in plaintiff's treatment. As a result, plaintiff has not stated a claim upon which relief can be granted under 42 U.S.C. § 1983 against defendants Brady and Ryan; therefore, their motion for summary judgment is granted.

C. Motion for Summary Judgment by Defendants CMS and Dr. Gordon

Defendants CMS and Gordon filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b).⁷ (D.I. 50) Defendants CMS and Gordon provide two grounds for granting their motion for summary judgment.

Defendants argue their motion for summary judgment should be granted because plaintiff has failed to exercise all available administrative remedies, as required by 42 U.S.C. § 1997e(a). (Id. at 2) In her complaint, plaintiff states she filed the appropriate grievance form with BWCI. (D.I. 2 at 2) Plaintiff does not state what resolution, if any, there was to her complaint, but writes: "I discussed what happened with St. Lt. Snead and they had fired the doctor. She suggested to seek legal representation." (Id.) From this, the court concludes that the grievance was resolved informally, consistent with the Delaware Department of Correction administrative procedures. (D.I. 50 at 3)

CMS and Gordon further argue summary judgment should be granted because plaintiff fails to set forth facts showing either defendant had personal involvement with the alleged violations of

⁷ Defendants CMS and Gordon also filed an answer to plaintiff's complaint which included a cross-claim against all other defendants. (D.I. 49 at 4) The cross-claim states that if defendants CMS and Gordon are found liable, they are only secondarily liable and therefore are entitled to contractual indemnification from all other defendants. (Id.)

plaintiff's rights. (D.I. 50 at 5) As to plaintiff's claim against Gordon, defendants argue plaintiff has failed to "set forth specific allegations of [Gordon's] personal involvement in the alleged violations of plaintiff's civil rights." (Id.) Furthermore, defendants contend plaintiff's claims are based on the quality of care she received, instead of a deliberate indifference to her medical needs.

At no point do these defendants contest plaintiff's version of the facts. Consistent with these facts, there is little doubt plaintiff's condition before and after giving birth was serious, given the subsequent death of plaintiff's child and the surgery plaintiff had to endure to remove the remainder of the placenta from her uterus. The court concludes there are genuine issues of material fact as to whether defendants CMS and Gordon were deliberately indifferent towards plaintiff's health and that of her unborn child in terms of the care received at BWCI and at the hands of Dr. Gordon. Therefore, these defendants' motion for summary judgment is denied.

D. Motion for Summary Judgment by Defendant St. Francis Hospital

Defendant St. Francis Hospital filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(b).⁸

⁸ Defendant St. Francis Hospital also filed an answer to plaintiff's complaint which included a cross-claim against all other defendants. (D.I. 53 at 8) The cross-claim states that if defendant St. Francis Hospital is found liable, it is entitled to

(D.I. 50) Defendant argues plaintiff has failed to show the hospital acted with deliberate indifference. See Estelle, 429 U.S. 104. According to defendant's brief, the hospital staff merely "observed, monitored, examined, tested, medicated, and counseled" plaintiff. (D.I. 51 at 9) Further, defendant argues that its staff advised Gordon of plaintiff's condition and followed his orders. (Id.)

Defendant is correct that plaintiff fails to set forth any specific allegations of deliberate indifference by the staff at St. Francis Hospital. In addition, the medical records submitted by the Hospital indicate plaintiff received proper treatment while admitted to the Hospital to deliver her baby and during her subsequent surgery. Plaintiff has offered no evidence to support her claim that St. Francis Hospital acted wrongly in any way. As a result, plaintiff has failed to exhibit sufficient evidence to support her claim against this defendant. St. Francis Hospital's motion for summary judgment is granted.

V. CONCLUSION

For the reasons stated, defendants Brady, Ryan and St. Francis Hospital's motions for summary judgment are granted and defendants CMS and Gordon's motion for summary judgment is denied. An appropriate order shall issue.

indemnification from all other defendants. (Id.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BERNADETTE LISA FOGELL)	
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Plaintiff,)	
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v.)	Civil Action No. 01-611-SLR
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PATRICK RYAN, Warden, JANE)	
BRADY, Attorney General,)	
CORRECTIONAL MEDICAL SERVICES,)	
GAIL HAYES, DR. CECIL GORDON,)	
and ST. FRANCIS HOSPITAL,)	
)	
Defendants.)	

O R D E R

At Wilmington this 30th day of July, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Defendants Patrick Ryan and Jane Brady's motion for summary judgment (D.I. 47) is granted.
2. Defendant St. Francis Hospital's motion for summary judgment (D.I. 51) is granted.
3. Defendants Correctional Medical Services and Dr. Cecil Gordon's motion for summary judgment (D.I. 50) is denied. Because these defendants have made a jury demand, a jury trial shall be scheduled in due course, once an attorney accepts representation of plaintiff.
4. To the extent any cross-claims remain extant, they are bifurcated pending resolution of plaintiff's claims against the

remaining defendants.

Sue L. Robinson
United States District Judge